Filed 2/28/12 In re Owen S. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re OWEN S., a Person Coming Under the Juvenile Court Law.	
DEL NORTE COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES, Plaintiff and Respondent, v. Danielle S., Defendant and Appellant.	A132310 & A133091 (Del Norte County Super. Ct. No. JVSQ10-6047)

In dependency proceedings for her son Owen S., mother, Danielle S., appeals: (1) a May 9, 2011, postservices order giving her one last visit with the child, and (2) a July 15, 2011 order terminating her parental rights (Welf. & Inst. Code, § 366.26).[1] Her single claim on both appeals is of an abuse of discretion in limiting visitation on May 9. Her second appeal raises no error in the termination hearing itself, but claims that the earlier order undermined her ability to show, against the termination of rights, an overriding beneficial relationship for Owen. (*Id*., subd. (c)(1)(B)(i).) The second appeal also operates to prevent finality of the termination of rights from rendering the first appeal moot. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 413-414.) We ordered the appeals consolidated and now affirm both orders.

[1] Unless otherwise stated, all dates are in 2011, and all section references are to the Welfare & Institutions Code.

BACKGROUND

Early History

Owen was born in Washington in April 2008. His father, B.H., was not located until after disposition in these proceedings, but he was thereafter represented by counsel. The father, never married to mother or in a parental relationship with the child, remained in Washington. He does not challenge termination of his own parental rights, and does not appear in these appeals. His sister (Owen's paternal aunt) and her husband, also Washington residents, were ultimately approved for placement in Washington through the Interstate Compact on Placement of Children (ICPC). (Fam. Code, § 7900 et seq.; *In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 455, 458-459.) The court, after terminating mother's reunification services and setting a permanent plan hearing, approved Owen's transfer to their foster care, and they are now prospective adoptive parents.

Mother came to this case with a history of childhood trauma, drug use, untreated mental illness, mental deficits, unstable housing, indiscriminate sexual alliances since age nine, childbirth since age 15, domestic abuse, unemployment, dependence on government assistance, and intervention by child protective services in Washington. She described her firstborn and another child besides Owen as "adopted" or "relinquished" (one living with an aunt and uncle in Washington), and gave birth to a fourth child during this case.

This case began in April 2010, just before Owen's second birthday. Mother had traveled with him to Crescent City, California, fleeing abuse from Randy H., a man she would describe as "the only father" Owen had ever known,[2] and the Del Norte County Department of Health & Human Services (department) became involved when mother resisted a safety plan offered to her as she was being evicted from a Crescent City hotel, had left Owen with a friend in the area (Paulette Beck), lacked clothing, diapers or food for Owen, and seemed to be under the influence of drugs. Owen was detained on a petition filed that month and remained in the foster care of Cindy H. for a full year.

[2] Mother called Owen "R.J.," short for Randy Jr.

Some delay was occasioned in securing a guardian ad litem (GAL) for mother, but she entered a negotiated jurisdictional resolution in early July 2010, obtaining dismissal of allegations of drug use and domestic violence. After briefly testifying, she submitted on allegations of failure to protect (§ 300, subd. (b)) in that she: had symptoms of untreated mental illness; had an extensive history with child welfare services in Washington; had two other children that were no longer in her custody; had been found being evicted and unable to meet Owen's needs for food and clothing; had left without word as to her whereabouts during department efforts to develop a safety plan for Owen; and had threatened to take him by force and return to Washington. Those allegations were found true.

Mother began services and supervised visits under a temporary case plan, and secured stable local housing. At disposition in July 2010, she submitted on a report and recommendations. The court declared dependency, retained Owen out of her custody, ordered reunification services for her, adopted a case plan, and set a six-month review for December 2010. Mother did not appeal. She was pregnant with her fourth child and planning on relinquishing the child to focus on reunifying with Owen.

By December 2010, mother had requested and been authorized to move to Brookings, Oregon, about 30 miles across the California border. She lived in a residential hotel where received supportive services from Oregon Boys and Girls Society, a private adoption agency located in Portland. Owen remained in foster care in Crescent City, and the department had begun an ICPC evaluation for the paternal aunt and uncle in Washington. The report recommended terminating reunification services and setting a permanency planning hearing. Mother had maintained visitation and loved Owen very much, but her overall plan participation and attendance was minimal. Also, a psychological evaluation by clinical psychologist Eric Morrell indicated that mother was "simply too severely damaged, limited, and pathological ever to parent a child competently for the next several years or probably ever."

A delayed contested review took place on February 9, 2011, with mother unsuccessfully opposing the termination of services. After hearing testimony from

Dr. Morrell, case worker Laurie Chandler-Kaye, and mother, the court followed the report recommendations, terminating services and setting a permanency planning hearing (plan hearing) (§ 366.26) for April 8.

The plan hearing ultimately did not occur until July. After one further visit with Owen in mid-February, mother gave birth, and went to Washington without permission. Her leaving thwarted efforts to serve her with timely notice of the plan hearing. She left behind a filed notice of intent to challenge the setting orders by petition for extraordinary writ, but this court ultimately struck her filing for failure to file a petition.

The Visitation Issue

On April 8, and with ICPC approval evidently having been obtained, the paternal aunt appeared in court to request Owen's transfer to her and her husband's care in Lakewood, Washington. Mother, it turned out, had moved to Onalaska, Washington, a rural area about 50 miles away from their home, and since they were concerned about resuming mother-son visits after the latest visitation lapse, she asked that there be no visits in Washington. Cindy H., the child's foster parent for one year, also opposed resumed visits, stating that Owen's bond with his mother had diminished during the lapse and that a new round of visits could cause him emotional harm. Owen's counsel held the same view, also raising security concern. Mother's counsel was away on vacation, but her GAL who had been in phone contact with mother, urged that visits resume after the move. The department had also heard from mother that she wanted visits and urged that one final visit might be appropriate. The court approved Owen's relocation to Washington but set the dispute for a hearing on April 22, preserving the status quo by barring further visits in the interim.

On April 22, mother's counsel was present but requested an evidentiary hearing on the visitation question. Owen was reportedly doing well with the new foster placement in Washington, but the caretakers were not interested in an open adoption and did not want regular visits to be resumed just to have them end at the expected June plan hearing. The department and Owen's counsel supported one final visit, to alleviate any concerns the child might have about mother abandoning him, but not regular visits. Owen's counsel

stressed that the child had many different caregivers in his short life, with mother running off or disappearing for weeks at a time, yet had managed to bond with one foster parent. Now, with the emphasis of the proceedings having shifted to Owen's best interests rather than mother's bond with him, the child now needed to bond with the relatives that offered the new foster care/adoptive home. Counsel for mother said that mother understood that adoption was in the works but had expected that visits would continue once Owen moved to Washington. Counsel urged that continued visits were in Owen's best interests, and the court, noting that parental rights had not yet been terminated, set the hearing for May 9 in order for counsel "to prove that" if he could. The court again preserved the status quo by not authorizing visits.

The May 9 hearing featured testimony from case worker Chandler-Kaye and former foster mother Cindy H. Mother appeared by telephone but did not testify. It included the following.

Chandler-Kaye. Since leaving in mid-February, mother had no contact with Owen. Mother did not know where the aunt lived, and the department, according to policy, had kept the aunt's address and phone number confidential. Owen had just turned three years old and was adjusting well to his new home. Sometime before leaving California, he had said something about his mom being dead, but since the move, he had spoken of her as being "broken" and was concerned about that. He thought she lived in the Family Resource Center, where their visits used to be, and he said after his own move that he missed having crackers and cheese and juice with his mom.

Visits preceding mother's departure had gone well. All were supervised and an hour and a quarter to an hour and a half long. Mother's attendance earlier in the case had at times been less than 50 percent, but in the six weeks of January and February before she left, mother was more consistent than ever, making four visits a week or calling to cancel if she had to miss. She was always appropriate, emotionally aware of Owen's needs, emotionally responsive, and respectful. She and Owen were always happy to see each other, but Owen was not upset if a visit did not occur. Transitions into and out of

visits "were always very smooth, not a lot of emotionality on either [side]," and "[i]t was easy to say goodbye."

Chandler-Kaye had expected regular visits to continue until the plan hearing. She supervised the last one and was surprised when mother left that weekend, for mother had told her she would be staying. After giving birth that weekend, mother felt it was "in her best interest" to go back to Washington, and anticipated that visits would resume there in a few weeks, once Owen relocated to his new home. The relocation took much longer. The result was nearly a three-month hiatus in visits, and for a while, some regressive behavior, for mother had told Owen at the last visit that she would be back. Chandler-Kaye knew that Owen manifested stress with a kind of blank stare, looking overwhelmed and emotionally detached. Chandler-Kaye said she saw that in the last two visits with mother, probably due to talk of his impending move and because children associated their case workers with such moves. Owen, although potty trained, started having accidents. No one had discussed with him mother stopping her visits, and in the end, Chandler-Kaye felt that "the concept of moving" from a familiar foster home "coupled with the end of the visitation was just . . . a lot for him." More recently, Owen's accidents had stopped. He was improving, doing much better, no longer particularly stressed, and laughing and building a peer relationship with a little boy who lived next door.

Chandler-Kaye felt it was in Owen's best interests to have one final mother-son visit, to be supervised by a case worker from Washington and occur at a children's center there. This could alleviate any concerns Owen had about mother's well-being, allow her to assure him she loved him, to say that she would be gone a long time, and to support him in his new home, encouraging him to make friends, behave, and do well. Chandler-Kaye also felt confident that mother, having been emotionally and mentally stable, would handle the situation well, and saw a last visit as "a preventative piece" in the sense that, given their physical proximity and family connections, there was a probability that mother and son would meet eventually.

On the other hand, Chandler–Kaye saw a risk of emotional suffering and confusion for Owen in having regular visits resume and the relationship reestablished, only to end again after the plan hearing. The paternal aunt and uncle had made clear that they supported a final visit on the conditions proposed, but would not support an "open adoption" with continued visits. Mother had expressed to Chandler-Kaye the same concern several times, querying: " 'Well,' you know, 'is it fair for him if I'm not going to get to be his mom that I'm just'—you know, 'continuing to visit may be just cause him pain.' " That demonstration of understanding and willingness to put Owen's needs first also encouraged Chandler-Kaye that mother would be able to handle a final visit appropriately.

Cindy H. Cindy H., a foster mother for 10 years and Owen's foster mother for a third of his young life (until a month before the plan hearing), felt that she knew Owen probably better than anyone else. She had logged mother's visits at about 30 percent from April to October 2010, and then 70 percent or more from then through the last visit, in February 2011. She described Owen as having "a mind of his own," sometimes signaling "I'm done" before the end of a visit, sometimes returning from one "in a mood," and sometimes not wanting to "go see mommy" at all, saying "No, I'm staying home." His reluctance could be overcome by waiting 10 or 15 minutes and recasting the event as going "bye-bye" with Sandy, who transported him to the visits. Sometimes he did not want to leave Sandy once he got there, but could be persuaded if mother presented him with a toy or food. Mostly, he was "real laid back and just kind of went with the flow." If mother canceled, he "didn't react," but if she failed to show up after he had waited for her at the visitation site, he would be upset that he was not having fun.

After visits, Owen would "not really" talk about mother. Asked how the visit went, what kind of things he did, or whether mom had a toy, he would say if he got a toy or chocolate—"his big things"—and they would have to play with any toy he got. The incident alluded to by Chandler-Kaye, after the final visit, was once when a television episode dealt with someone's mother having passed away the previous year, "and so they used the words 'dead' and 'gone' interchangeably." Cindy H. was playing with Owen

and did not think he was paying attention until he looked at her and said, " 'Oh, my mommy's dead.' " She shook her head and explained: " 'No, mommy's not dead, she's just'—'she's gone but she's not dead. She's just not here.' " Owen said, " 'Oh, okay,' " and that was "the only time he brought her up or really said anything about her." Owen understood that his mother was alive. He had not acted strange, unusual or uncomfortable after the final visit.

Asked if she thought one last visit with mother would be good for Owen, Cindy H. said: "Because it's been three months and he really didn't have a bond with her before, I don't see that it would be any benefit to him. I would be afraid that it may stir up some emotional problems that would have to really be dealt with later." She added, shaking her head, "I—I just—I don't see any good com[ing] out of it."

Argument and ruling. The department argued that restarting regular visits at this point, after the three-month lapse, would be detrimental to Owen's emotional health, but that one final visit was appropriate. Counsel for Owen and for father each concurred with not restarting regular visits, stressing a need for Owen to bond quickly and solidly with his new family; and both counsel were skeptical that a last visit, for what was being called "closure," was appropriate for a child of Owen's age and after he had already worked out her leaving in his own way. Mother's counsel alone advocated regular visits. Calling his position "a pure legal argument," counsel argued: "Parental rights haven't been terminated. She has a right to visits unless there's a showing that there's a danger to the child. There's no danger. There's no testimony that there was danger."

The court denied regular visits as simply setting the child up to "reestablish a relationship" that would be cast aside as another separation occurred. The court noted that the plan hearing was still set for June 24 (six and a half weeks away) and that there was no reason to think that the plan would be anything but adoption or that Owen would not be found adoptable. The court did order one last supervised visit, encouraged by testimony that mother would act appropriately and finding that it would not be harmful, would perhaps set Owen's mind at rest sometime ahead, and that, since the adopting

parent would be a relative, there was some likelihood of mother and son encountering one another someday, by chance or at a family gathering.

Mother filed a notice of appeal one month after that order.

Termination of Parental Rights

On June 24, mother's counsel was out of town, and stand-in counsel secured a continuance to July 8 in order for the other attorney to return and examine a newly filed plan hearing report to assess whether mother would contest recommended termination of parental rights and selection of adoption as the permanent plan.

A further continuance, to July 15, was ordered on July 8. Mother's GAL had requested, and been denied, a stay of proceedings pending mother's appeal of the visitation order, and the continuance was for the GAL to assess her remedies. Appearing by telephone, mother represented that she was set to have her final visit on July 20.

Meanwhile, a June 15 adoption assessment by the California Department of Social Services determined that Owen was adoptable and recommended a plan of adoption and terminating parental rights. The paternal aunt and uncle were approved to adopt, and Owen, after two months with them and their teenage children, was "clearly developing a close relationship" with the family. The assessment advised, "Removal from the current home could be detrimental to [Owen's] well being." The foster parents remained unwilling to enter a postadoption contact agreement (Fam. Code, § 8714.7) for continuing mother/child contact.

A plan hearing report filed by the department a week later followed with the same overall conclusions and recommendations.

At the July 15 plan hearing, mother's counsel announced that mother would not file a petition for modification (§ 388), and all parties submitted on the report, without testimony or other evidence. Mother's counsel and GAL represented that mother had been contacted that morning, that her circumstances had not changed, and that there was no "evidence to oppose the recommendation." The court followed the recommendations, found Owen to be adoptable, terminated parental rights, and ordered Owen placed for adoption. Mother timely filed her second notice of appeal on August 22.

DISCUSSION

Denial of Resumed Regular Visits

The argument undergirding both appeals is that the denial of resumed regular visits was an abuse of discretion because a finding of detriment to Owen is not supported by substantial evidence. Mother cites this authority: " 'Absent a showing of detriment caused by visitation, ordinarily it is improper to suspend or halt visits even after the end of the reunification period. [Citations.] Visitation may be seen as an element critical to promotion of the parents' interest in the care and management of their children, even if actual physical custody is not the outcome. [Citation.]' " (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1138, quoting *In re Luke L.* (1996) 44 Cal.App.4th 670, 679.) In both of those cases, however, there was still a prospect, however dim, that the parents could still reunify with the children. (*In re Nicholas B., supra,* 88 Cal.App.4th at p. 1138; *In re Luke L., supra,* 44 Cal.App.4th at p. 680.) Mother cited no authority that would make a finding of detriment necessary in a case like this one, where there was absolutely no prospect of reunification and no indication that the adoptive parents would allow mother continued contact. The rule as stated in those cases is that detriment is *ordinarily* required in order to halt visitation, but the case here, where mother no longer had any discernible interest in the care and management of her child, hardly seems like an *ordinary* case.

But even if we assume this *was* an ordinary case and further assume, for sake of argument, that there was no substantial evidence to support a detriment finding, the record makes it impossible to make out prejudice from the visitation denial. Where, in other words, can we find a reasonable probability that, had mother's visitation been reinstated, the result in the proceedings would have been any more favorable? Mother's briefing is silent on the point, and her counsel below, apparently stumbling over the same practical problem, called his claim "a pure legal argument."

An appellant seeking reversal of an order must show not only error, but also legal prejudice resulting from it. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 119). And mother fails to demonstrate—

indeed, even address—prejudice. Nor do we discern on our own any reasonable probability that regular visits would, in the circumstances, have made any difference in the course of the case.

No prejudicial error is shown or otherwise apparent.

Termination of Parental Rights

There remains mother's contention that the May 9 order, if causing no immediate harm, nevertheless prejudiced her ability to show, at the later plan hearing, application of the beneficial-relationship exception to terminating her parental rights (§ 366.26, subd. (c)(1)(B)(i)). She concedes that this is a novel claim lacking case law precedent.

The department argues at the threshold that mother has forfeited this issue by not making any effort to show application of the exception at the plan hearing. The forfeiture rule surely does apply generally in dependency proceedings (*In re S.B.* (2004) 32 Cal.4th 1287, 1293), and specifically to beneficial relationship exceptions (*In re Erik P.* (2002) 104 Cal.App.4th 395, 402-403). We also see from the record that mother not only failed to raise the issue, but her counsel, in submitting on the report, affirmatively stated that there was no "evidence to oppose the recommendation."

We do not decide forfeiture. Assuming for sake of argument that mother's failure to raise the claim below has not forfeited the claim for appeal, her failure to raise it leaves her with a record upon which, once more, she cannot show prejudice.

Her burden to prevail on the beneficial-relationship exception was heavy. "The specified statutory circumstances—actually, *exceptions* to the general rule that the court must choose adoption where possible—'must be considered in view of the legislative preference for adoption when reunification efforts have failed.' [Citation.] At this stage of the dependency proceedings, 'it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home.' [Citation.] The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption." (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

The specific exception invoked here is the "beneficial parental relationship," and it applies if termination of parental rights would be detrimental to the child because the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) "[T]he phrase 'benefit from continuing the relationship' [refers] to a relationship that 'promotes the well-being of the child *to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.* In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be *greatly harmed*, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Jason J.* (2009) 175 Cal.App.4th 922, 936.) " 'Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' [Citation.] Evidence of 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship. [Citation.]" (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315-1316.)

The record we have fails to demonstrate such a relationship. Yes, it shows that mother felt emotionally close and bonded to Owen, but the primary question under the exception is what kind of bond he felt toward her. Mother had raised him until age two. We do not know the nature of his bond back then, but the record is not encouraging. It shows that mother had poor parenting skills, tended to go absent, used drugs, engaged in domestic violence, had unstable housing, and presumably left Owen in the care of others. This aspect of the record is simply undeveloped since mother never raised an issue about it, giving no one an occasion to present evidence directly on point.

We do know more about Owen's bond with mother during the last year, but foster mother Cindy H. provided no support for Owen having a close enough bond with mother to satisfy the parental-relationship exception. There were frequent visits toward the end

of that time, but Owen almost never spoke about mother, beyond the toys and chocolates she gave him; sometimes had to be persuaded to see her or wanted to leave visits early; separated easily at the end of visits; and had no particular reaction to having or not having visits. Some regressive behavior after mother left may have been due to her sudden move in breach of her promise to come back, but another apparent cause was the prospect of moving to the new foster home in Washington. Caseworker Chandler-Kaye had a similar view: mother and son were always happy to see one another; but Owen was not upset if visits did not occur; transitions were always smooth, with little emotionality on either side; and Owen found it easy to say goodbye.

Then came the three month halt in visits occasioned by mother's sudden move. Whatever the strength of Owen's bond with her when she left, it surely did not strengthen during the hiatus. Testimony was that, after the initial regression, Owen seemed to have no residual emotional problems, and he bonded quickly to his new foster family, happy and befriending a neighborhood boy his age. This, of course, does not at all suggest a parental relationship beneficial enough to justify denying Owen the permanency of an adoptive home.

Mother tries to fault the department for the initial hiatus, stressing testimony that she and the department initially expected that Owen would relocate to Washington sooner than he did. But we see nothing suggesting that the extra time was the department's fault. Nor does the record support mother's suggestion that the department somehow approved of her move. The record shows, rather, that the move took the department completely by surprise.

The court, moreover, moved promptly to hear and resolve the question of whether to reinstate regular visits. The issue first arose on April 8, had to be continued to April 22 due to the absence of mother's counsel, and was then set for a May 9 evidentiary hearing at mother's counsel's request. Given the concern by other parties that resuming regular visits (or even having one last visit) could be detrimental, we cannot fault the court for preserving the no-visit status quo until the evidentiary hearing. It was also mother's own move out of state, not any other party's actions, that had created the status quo. The

court's plan until then was to have a generous minimum of five visits a week. Mother's own action thwarted that regimen.

Thus any abuse of discretion on May 9 in the court denying regular visits affected, at most, the last 10 weeks leading to the plan hearing. The ultimate termination of her parental rights, moreover, was based on Owen's adoptability and mother's failure to reunify, not on any postservices lack of visitation.

As has been stated: "The kind of parent-child bond the court may rely on to avoid termination of parental rights under the exception . . . does not arise in the short period between the termination of services and the [plan] hearing." (*In re Richard C*. (1998) 68 Cal.App.4th 1191, 1196.) There was unusual delay here between those events, but mother's three-month voluntary absence from the state was the precipitating event and, with resulting difficulty in serving her with notice of the plan hearing, a cause for delay. The larger point is that, if Owen ever had a sufficient bond with mother to merit arguing the exception, this should have been evident before she left the state and not significantly affected by any hiatus attributable to abuse of the court's discretion. Since mother never established a better record by arguing the exception at the plan hearing, we are left with a record that cannot support her claim of prejudicial error.

DISPOSITION

The orders are affirmed.

_____
Richman, J.

We concur:

_____
Haerle, Acting P.J.

_____
Lambden, J.